



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 10343862

Date: OCT. 1, 2020

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks an EB-2 immigrant visa to classify the Beneficiary as a physical therapist, as a member of the professions holding an advanced degree and who is employed in a Schedule A, Group I occupation. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2); section 212a(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i); 20 C.F.R. § 656.5(a). The U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. professional nurses and physical therapists who are able, willing, qualified, and available for these occupations, and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals. 20 C.F.R. § 656.5.

The Director denied the petition and a subsequent motion, concluding that the record did not establish that the Petitioner had the continuing ability to pay the proffered wage, and that the Petitioner did not establish that it provided proper notice of the filing of a labor certification. We dismissed a subsequent appeal. The matter is now before us on a motion to reopen and motion to reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the motion to reopen and motion to reconsider.

I. SCHEDULE A PETITIONS

Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified labor certification from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified labor certification. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.¹ If USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

¹ The priority date of the petition is December 12, 2016, the date the completed, signed petition was properly filed with USCIS. *See* 8 C.F.R. § 204.5(d).

II. MOTION REQUIREMENTS

A petitioner must meet the formal filing requirements of a motion and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1). A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of USCIS or Department of Homeland Security policy.

III. ABILITY TO PAY THE PROFFERED WAGE

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the Petitioner's ability to pay, we first examined in our appellate decision whether it paid a beneficiary the full proffered wage of \$80,000 per year each year from a petition's priority date. Prior to this motion, the Petitioner did not assert that the Petitioner had employed the Beneficiary or paid him any wages from the priority date onward. We next examined whether the Petitioner had sufficient annual amounts of net income or net current assets to pay the proffered wage and concluded that the Petitioner's net income² of \$37,306 in 2016 was \$42,694 less than the proffered wage, and that its net current assets³ of \$10,198 were \$69,802 less than the proffered wage. Therefore, for the year 2016, we concluded that the Petitioner did not have sufficient net current assets to pay the proffered wage. On appeal, we also considered evidence of the Petitioner's ability to pay beyond its net income and net current assets. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967). We thoroughly reviewed the totality of the circumstances and concluded that the Petitioner had not established its continuing ability to pay the proffered wage.

² In this case, the Petitioner's 2016 net income is found on line 18 of Schedule K of its IRS Form 1120S, U.S. Income Tax Return for an S Corporation.

³ Net current assets are the difference between a petitioner's current assets and current liabilities. Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory, and prepaid expenses. Joel G. Siegel & Jae K. Shim, *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000). Current liabilities are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. We noted in our appeal decision that although the Petitioner used the accrual method of accounting in 2016, its only current asset was cash and it listed no current liabilities that year, including no accounts payable.

A. Motion to Reopen

The Petitioner submits the following evidence on motion: copies of IRS Forms W-2, Wage and Tax Statements, issued by the Petitioner to the Beneficiary in 2015 and 2016; copies of the Beneficiary's pay stubs in 2015 and 2016; and a copy of the individual federal tax return of the Petitioner's sole shareholder for 2016.

The Petitioner's counsel asserts that "it has recently come to counsel's attention that beneficiary was employed by Petitioner in 2015 and 2016." He states that the Petitioner had previously filed another Form I-140 for the Beneficiary and that while the petition was pending, the Beneficiary began working for the Petitioner as an assistant. He asserts that the Beneficiary worked for the Petitioner from November 2015 to May 2016, and that the \$28,800 paid by the Petitioner to the Beneficiary in 2016 reduces the deficit between the proffered wage and the Petitioner's net income to \$13,894. He reasserts on motion that the Petitioner's uncharacteristic medical supply and legal expenses in 2016 cover the deficit, and that the Petitioner's sole shareholder/officer is willing and able to forgo \$25,000 of his officer compensation to pay the proffered wage.

We will first address the purported wages paid to the Beneficiary by the Petitioner. The current petition and labor certification were filed on December 12, 2016. On the labor certification, the Beneficiary did not list the Petitioner as a former employer in Part K, which required him to list "all jobs [he] has held during the past 3 years." Omission of the Beneficiary's purported recent experience with the Petitioner on the labor certification lessens the credibility of the wage evidence submitted on motion. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, on a Form G-325A, Biographic Information Form, signed by the Beneficiary on December 8, 2016, he listed his employment from December 2006 through June 2014, and stated "none" on the entry representing the period from June 2014 to the "present time" in December 2016. The Beneficiary signed the form above a notice indicating "[s]evere penalties are provided by law for knowingly and willfully falsifying or concealing a material fact." If the Beneficiary was employed by the Petitioner from November 2015 to May 2016, he knowingly and willfully falsified information on the Form G-325, and the omission of such experience on that form lessens the credibility of the wage evidence submitted on motion in this case. *Id.*

In its October 2017 response to the Director's request for evidence relating to the issue of the Petitioner's ability to pay, the Petitioner did not indicate that it had ever employed the Beneficiary. It submitted the Petitioner's 2016 tax return, a staffing agreement, and a letter from the Petitioner's accountant, but it did not submit any evidence of the Beneficiary's prior employment with the Petitioner. In his initial decision, the Director noted that the Beneficiary was not currently employed by the Petitioner, and the Petitioner agreed with that statement in a subsequent motion. In a subsequent decision denying the Petitioner's motion to reopen and motion to reconsider, the Director highlighted that the Petitioner employed only one person in 2016 and that it was unclear what occupation this person performed. In a subsequent appeal, the Petitioner again did not indicate that the Petitioner had ever employed the Beneficiary, and it did not identify the sole employee mentioned by the Director in his motion decision or submit any payroll or tax documents evidencing that individual's employment with the Petitioner. In an affidavit submitted on appeal, the Petitioner's sole shareholder/officer did not indicate that the Petitioner had ever employed the

Beneficiary, but instead stated that “I would now like to have [the Beneficiary] join our staff” and that the “decision to hire [the Beneficiary]... was based on the growth of the company.”

Now, on motion, the Petitioner asserts that the Beneficiary worked for the Petitioner from November 2015 to May 2016. As discussed above, the evidence submitted on motion related to the Beneficiary’s purported prior employment with the Petitioner conflicts with the Beneficiary’s attestations on the labor certification and Form G-325 and is not credible.⁴ Further, the Petitioner has not established that the evidence constitutes new facts. A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Therefore, we will not accept the Forms W-2 issued by the Petitioner to the Beneficiary in 2015 and 2016 and copies of the Beneficiary’s pay stubs in 2015 and 2016 as evidence of the Petitioner’s ability to pay the proffered wage.⁵ The Petitioner must establish its ability to pay the full proffered wage of \$80,000 per year from the priority date in 2016 onward.

On motion, the Petitioner also submits a copy of the individual federal tax return of the Petitioner’s sole shareholder for 2016 and states that the Petitioner’s sole shareholder/officer is willing and able to forgo \$25,000 of his officer compensation to pay the proffered wage.⁶ We concluded on appeal that \$25,000 is insufficient to cover the deficiencies in the Petitioner’s 2016 tax return. Given that we have declined to accept evidence of the Beneficiary’s purported wages from the Petitioner on motion, \$25,000 remains insufficient to cover the deficiencies in the Petitioner’s 2016 tax return.

Further, we noted in our decision on appeal that the Petitioner has not established that the sole shareholder was able to forgo \$25,000 in 2016. We noted that his personal tax return shows that his adjusted gross income was \$89,546 in 2016, but the Petitioner did not demonstrate his personal expenses. On motion, it states that he had no dependents and had minimal personal expenses. The tax documentation submitted on motion shows that he paid \$17,100 in rent and \$9,263 in personal income taxes in 2016, but it does not detail any of his other personal expenses.⁷ A petitioner’s unsupported statements are of limited weight and normally will be insufficient to carry its burden of proof. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The new evidence submitted on motion does not establish that the sole shareholder was able to forgo \$25,000 in 2016.

The evidence submitted on motion does not establish the Petitioner’s ability to pay in 2016. We will dismiss the motion to reopen.

⁴ USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

⁵ *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 117 (1st Cir.2009) (“There is no question that the AAO has discretion to decide how to weigh relevant evidence in assessing a prospective employer’s ability to pay a proffered wage”). In adjudicating the petition pursuant to the preponderance of the evidence standard, we must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

⁶ In 2016, he earned \$52,240 in total officer compensation.

⁷ Additional expenses include, but are not limited to: food; car payments (whether leased or owned); insurance (auto, homeowner, health, life); medical; utilities (electric, gas, cable, phone, internet); credit cards; student loans; clothing; and any other recurring expenses.

We note that in our decision on appeal, we stated that if the Petitioner pursues this matter further, it must demonstrate its ability to pay from 2016 onward. On motion, it did not provide its tax returns, audited financial statements, or annual reports for 2017, 2018, or 2019. The petition cannot be approved because the Petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date in 2016 onward.

B. Motion to Reconsider

As noted, the Petitioner's 2016 federal tax return states net income of \$37,306, which is \$42,694 less than the proffered wage. The Petitioner's 2016 tax return states end-of-year net current assets of \$10,198, which is \$69,802 less than the proffered wage. Therefore, for the year 2016, the Petitioner did not have sufficient net income or net current assets to pay the proffered wage. In our appeal decision, we considered evidence of the Petitioner's ability to pay beyond its net income and net current assets and determined that it had not established its ability to pay based on the totality of the circumstances. *See Matter of Sonegawa*, 12 I&N Dec. at 614-615.

Specifically, we stated that in this case, the record indicates that the Petitioner was established in December 2011. Therefore, it had only been in business for five years at the time the petition was filed in December 2016. In *Sonegawa*, the Petitioner had been in business over 11 years at the time of filing the petition. *Id.* at 614. Thus, at the time of filing, the Petitioner had been in operation less than half of the time of the petitioner in *Sonegawa*. The Petitioner does not dispute this analysis on motion.

Further, we stated in our decision on appeal that although the Petitioner's gross income increased each year from 2012 to 2016, it paid no salaries in 2012, 2013, and 2014; it paid minimal salaries in 2015 and 2016; and it had only one employee at the time of filing the petition. In contrast, the petitioner in *Sonegawa* paid wages to four regular employees and four part-time employees. *Id.* at 615. Thus, the Petitioner here had 25% of the number of full-time employees as in *Sonegawa*, and it had no part-time employees, at the time of filing. The Petitioner does not dispute this analysis on motion.

Further, we stated in our prior decision that unlike the petitioner in *Sonegawa*, the Petitioner here has not established its reputation in its industry. The petitioner in *Sonegawa* was a well-recognized fashion designer whose designs had been published in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. She lectured in fashion design at fashion shows and at colleges and universities. *Id.* The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business status and outstanding reputation as a couturiere. The Petitioner here has not demonstrated a similar magnitude of business activities. The Petitioner does not dispute this analysis on motion.

Further, we stated in our prior decision that the Petitioner here has not demonstrated that the Beneficiary will replace a current employee or outsourced service. Instead, the Petitioner plans to outsource the Beneficiary's services to another employer. The Petitioner does not dispute this analysis on motion.

In addition, we noted in our decision on appeal that the Regional Commissioner in *Sonegawa* indicated that the petitioner would substantially increase her business with the addition of an authentic oriental

clothing designer from Japan, “not only in the actual number of clients but also to the type of customer who is willing to pay a higher price for authentic Japanese designs and patterns.” *Id.* at 614. The expectation of a continued increase in business and increasing profits were directly tied to the Beneficiary’s employment in the petitioner’s custom dress shop. Here, we noted the Petitioner plans to outsource the Beneficiary to another employer and, therefore, indicated that it has not demonstrated that the Beneficiary will increase the Petitioner’s number or caliber of physical therapy clients. The Petitioner does not dispute this analysis on motion.

On appeal, the Petitioner further asserted that in 2016, it spent \$17,653 for medical supplies that it claims were not annual, recurring expenses because they have a shelf life of seven years. It stated that it only spent \$3,164 in medical expenses in 2015, which is “a more accurate recurring figure.” Thus, it asserted that the 2016 expenses were extraordinary expenses that reduced the Petitioner’s profitability. In *Sonegawa*, the petitioner changed business locations and paid rent on both the old location and new location for five months during the year in which the petition was filed. She also incurred large moving expenses and was unable to do regular business for a period of time. *Id.* at 614. In our prior decision, we determined that the uncharacteristic circumstances in *Sonegawa* are not analogous to the situation here. We noted that the Petitioner offers physical therapy services and that it purchased medical supplies related to those services.

On motion, the Petitioner asserts that our analysis of the uncharacteristic expenses in *Sonegawa* was too narrow. It asserts that in *Sonegawa*, it was not the fact that the petitioner had two rent payments that was uncharacteristic, but it was the amount of rent paid for the given year that was uncharacteristic. In other words, the Petitioner asserts that when determining whether an expense was uncharacteristic, it is not the nature of the Petitioner’s expense that matters, but the amount that was paid. We disagree.

In *Sonegawa*, the Regional Commissioner stated:

She has admitted that 1966 was not a good year. In that year petitioner changed to a better location, and for five months paid double rent; on her old place and on her new place. There were large moving costs and also a period of time when she was unable to do regular business.

Id. at 614. Thus, the uncharacteristic nature of the moving expenses – additional rent payments added to its regular rent payments, moving expenses that would not normally be incurred absent the move, and a period of business inactivity resulting from the move – resulted in unusual expenses for the employer. The Regional Commissioner did not cite the total amount of additional expenses resulting from the move in the decision or base the decision on that amount, but instead contemplated the nature of the expenses as part of a “careful consideration of all” of the circumstances. *Id.* at 615.

The Petitioner also asserts on motion that *Sonegawa* does not require a showing that the expense is uncharacteristic in the field, but only that it is an uncharacteristic expense for the Petitioner. It asserts that while medical supplies might be an ordinary business expense for a physical therapy clinic, the amount it paid for those supplies was uncharacteristic because it purchased specific supplies with a 7-year lifespan which are not typical expenses for the Petitioner. It cites the *Mirriam-Webster* dictionary definition of uncharacteristic as something that is not typical, or that is irregular or unusual. It asserts

that an “expense that is incurred once every 7 years... [is] irregular and unusual” for the Petitioner. We disagree with the Petitioner’s assertion that a medical supply expense that recurs at least once every seven years is an uncharacteristic, unusual, or irregular expense for the Petitioner’s physical therapy practice. In *Sonegawa*, the Petitioner’s uncharacteristic expenses included paying double rent for several months, large moving costs, and business inactivity resulting from a move; there is no indication that these expenses were expected to be incurred at least once every several years.

The Petitioner also asserted on appeal that it paid its attorney \$6,000 in 2016 to pay for the immigration process, and that this expense was not a recurring expense. Our denial decision stated that legal expenses incurred in connection with an employment-based immigrant petition are not the type of uncharacteristic expenses contemplated by *Sonegawa*. On motion, the Petitioner asserts that it paid approximately \$16,000 in legal and filing fees in 2016 and that “this is an extraordinarily high, and uncharacteristic, expense incurred by the Petitioner in 2016 which he will likely not incur again.” It asserts that an expense that is unlikely to occur again is irregular and unusual for the Petitioner.

The record conflicts as to the amount of uncharacteristic expenses incurred in connection with this employment-based immigrant petition. The affidavit of the Petitioner’s owner submitted on appeal indicated that it paid its attorney \$6,000 in 2016 to pay for the immigration process, while the Petitioner asserts on motion that it paid \$16,000, including “approximately \$10,000 in legal and filing fees associated with the first filing of the I-140... and additional legal and filing fees for the motion to reconsider and the filing of a new petition.” The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Further, the Petitioner has not indicated the amounts it has spent on legal expenses and filing fees in connection with this employment-based immigrant petition since 2016, including filing the prior motion in 2017, filing the appeal in 2018, and filing this motion in 2020. The Petitioner asserts that the 2016 expenses were unusual and unlikely to occur again, but given their apparent recurring nature, this assertion is without merit. Further, in *Sonegawa*, the Regional Commissioner’s decision was based in part on the Petitioner’s rebound in the year following the uncharacteristic expenses. *Id.* at 615. Here, the Petitioner has not shown a rebound in 2017 or demonstrated that its 2017 expenses were less than in 2016. Additionally, even if we accepted that the medical and legal expenses were uncharacteristic expenses in 2016, the combined amounts would not be sufficient to overcome the deficiencies in the Petitioner’s 2016 tax return.

As in *Sonegawa*, we considered many factors relevant to the Petitioner’s financial ability that fall outside of its net income and net current assets, including (1) the number of years it has been doing business; (2) the established historical growth of its business; (3) the overall number of employees; (4) the occurrence of any uncharacteristic business expenditures or losses; (5) the petitioner’s reputation within its industry; (6) whether the Beneficiary is replacing a former employee or an outsourced service; (7) the Beneficiary’s potential to increase the number or caliber of the Petitioner’s physical therapy clients; and (8) the willingness and ability of the Petitioner’s sole shareholder/officer to forgo officer compensation to pay the proffered wage. After a review of totality of the circumstances, we concluded that the Petitioner has not established by a preponderance of the evidence that it had the

ability to pay the salary offered as of the priority date of the petition onward. On motion, the Petitioner contests only two of the multiple negative factors detailed in our appellate decision.

The Petitioner has not demonstrated that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceeding at the time of the decision. Thus, we will dismiss the motion to reconsider.

IV. NOTICE OF FILING

The Director also denied the petition because the Petitioner did not establish that it provided proper notice of the filing of a labor certification (Notice). *See* 20 C.F.R. § 656.10(d). We reserved the issue in our decision on appeal. On motion, because the Petitioner's inability to pay the proffered wage is dispositive in this case, we need not reach the issue of the Petitioner's Notice and therefore reserve it.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.